

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
) CC Docket No. 98-79
GTE Telephone Operating Companies)
GTOC FCC Tariff No. 1)
GTOC Transmittal No. 1148)

REPLY OF GTE

GTE Service Corporation and its affiliated domestic telephone operating companies (collectively, "GTE"),¹ pursuant to Section 1.106 (h) of the Commission's rules and the Commission's Public Notice, DA 98-2502 (rel. Dec. 4, 1998), hereby files its Reply to Comments and Oppositions to Petitions for Reconsideration in the above-referenced matter. As set forth in GTE's Opposition and the submissions of many other parties, and as further explained herein, the Commission should reject the petitions for reconsideration.² In its order in the tariff investigation,³ the Commission (1) properly rejected the "two-call theory" and held that GTE's ADSL service was subject to federal tariffing; (2) limited the scope of its decision to the ADSL service GTE intended to provide; and (3) made clear the state and federal regulators' roles with respect to the

¹ GTE Alaska Inc., GTE Arkansas Inc., GTE California Inc., GTE Florida Inc., GTE Hawaiian Telephone Company Inc., The Micronesian Telecommunications Corporation, GTE Midwest Inc., GTE North Inc., GTE Northwest Inc., GTE South Inc., GTE Southwest Inc., Contel of Minnesota, Inc., and Contel of the South, Inc.

² MCI WorldCom Petition for Reconsideration, CC Docket No. 98-79 (filed Nov. 30, 1998) ("MCI WorldCom Petition"); Request for Clarification and/or Reconsideration of the National Association of Regulatory Utility Commissioners, CC Docket No. 98-79 (filed Nov. 30, 1998) ("NARUC Petition").

³ GTE Telephone Operating Cos., CC Docket No. 98-79, *Memorandum*
(Continued...)

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underlying service. The additional issues raised in petitions and comments thereon, which were not designated for hearing by the Commission, are outside the scope of this proceeding and, accordingly, do not compel reconsideration.

**I. THE COMMISSION SHOULD NOT ABANDON ITS LONG-STANDING
END-TO-END JURISDICTIONAL ANALYSIS.**

Some commenters joined MCI in arguing that the Commission misapplied its long-standing jurisdictional analysis in determining that GTE's ADSL service is interstate. These arguments were extensively briefed,⁴ and explicitly rejected,⁵ in the initial tariff investigation and provide no basis for the Commission to reverse or modify its *ADSL Order*.

In the *ADSL Order*, the Commission affirmed that it traditionally has determined the jurisdictional nature of communications by examining the end points of the communication, and consistently has rejected attempts to divide communications at any intermediate points of switching or exchanges between carriers.⁶ In the face of this precedent, commenters raise the familiar argument that an Internet session should be treated as two separate communications: an initial call to the Internet Service Provider ("ISP") point of presence ("POP") using a telecommunications service, and a second

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Opinion and Order, FCC 98-292 (rel. Oct. 30, 1998) ("*ADSL Order*").

⁴ See Rebuttal of GTE, CC Docket No. 98-79 at 5-11, n.11 and n.23 (filed Sept. 23, 1998) ("Rebuttal of GTE") (citing comments filed in the tariff investigation by Hyperion, ITC, Focal, Splitrock, ICG, WA, MCI, ALTS, CompTel, AT&T and ISP/C).

⁵ See *ADSL Order*, ¶ 16-21.

⁶ See *id.*, ¶¶ 17, 18 (citing *Petition for Emergency Relief and Declaratory Ruling of BellSouth Corp.*, 7 FCC Rcd at 1619, 1620 (1992)).

communication from the ISP POP to the Internet site using an information service.⁷

Under this theory, the ISP's POP is the jurisdictional end point of the communication, regardless of the ultimate destination of the communication. As GTE has explained extensively elsewhere, the FCC has long rejected this two-call theory.⁸

Contrary to some commenters' arguments, the regulatory distinction between a "telecommunications service" and an "information service" does not justify abandoning the end-to-end jurisdictional analysis adopted by the Commission in its *ADSL Order*.⁹ As GTE explained previously, regulatory labels do not delineate the FCC's jurisdiction but, instead, are used in developing policy *after jurisdiction has been established*.¹⁰ Moreover, there simply is no basis for concluding that Congress envisioned recasting the very core of the Commission's jurisdiction when it modified various regulatory classifications.¹¹ To the contrary, courts have recognized that the 1996 Act essentially kept intact the existing jurisdictional division between the federal and state authority.¹²

⁷ See ACI Comments at 4; WUTC Comments at 3-5.

⁸ See Direct Case of GTE, CC Docket No. 98-79, at 8-15 (filed Sept. 8, 1998) ("Direct Case of GTE"); Rebuttal of GTE at 2-8; Opposition of GTE at 3-6.

⁹ See ACI Comments at 4; Washington Utilities and Transportation Commission ("WUTC") Comments at 3-4; Logix Comments at 4; CTSI Comments at 4-5. CTSI attempts to discredit the Commission's rejection of this argument by suggesting that the FCC "provid[ed] no rationale" and "only cites a footnote from one of [its] ONA orders." *Id.* at 4; see also Logix Comments at 4. To the contrary, the Commission's reasoning was sound and well-supported, and the ONA order clearly supports its position that, for jurisdictional purposes, it will not artificially separate telecommunications and enhanced services components of a communication. See *ADSL Order* at ¶ 20.

¹⁰ See Rebuttal of GTE at 3-4.

¹¹ See ACI Comments at 4; WUTC Comments at 5.

¹² See *Iowa Utilities Board*, 120 F.3d 753 (8th Cir. 1997), *cert. granted sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 118 S. Ct. 879 (1998).

Some commenters argue that the Internet medium is so fundamentally different that the Commission should abandon its established end-to-end analytical framework, and instead should forge some undefined new approach to assessing its jurisdiction.¹³ RCN, for example, suggests that the Commission's "existing regulatory framework" is "anachronistic" and cannot be used to give order to "communications in the new millennium."¹⁴ What makes the Internet "fundamentally different" from existing modes of communication, according to RCN, is that it is a packet-switched medium and does not utilize constant end-to-end connectivity.¹⁵ Just because ADSL enables communications that may be brief, or may utilize packet-switched technology, does not change the jurisdictional nature of the end-to-end communication.¹⁶ Indeed, although wireless telephone service and satellite TV also represented dramatic technological advances, the FCC did not fundamentally recalibrate its jurisdiction with respect to these services.¹⁷

Also unfounded is WUTC's assertion that "policy considerations" somehow trump well-established precedent, and compel the Commission to alter its approach and

¹³ See ACI Comments at 4-5; RCN Comments at 6-8.

¹⁴ See RCN Comments at 6-7.

¹⁵ See, *id.*; see also ACI Comments at 3.

¹⁶ Similarly, the Telephone Resellers' Association suggests that there is no cognizable interstate aspect of Internet communication because distant websites to which, or from which, information is sent are not end points, but are more like "intermediate points of switching." See TRA Comments at 3-4. This analysis is illogical and is akin to suggesting that a passenger travelling on a round trip ticket never actually leaves home. Information retrieved by an end user in Miami from a website located in California is clearly interstate.

¹⁷ See Direct Case of GTE at 9-10.

disclaim jurisdiction over GTE's ADSL tariff.¹⁸ WUTC submits two court cases to support its proposition that policy arguments may affect jurisdictional determinations.¹⁹ Yet, these cases suggest only that, in limited instances, courts have followed *clear policy cues* from Congress in resolving jurisdictional ambiguities. Here, there is no such ambiguity about the relevant test, nor is there a clear signal from Congress to suggest that the FCC lacks jurisdiction over this type of service. Neither WUTC, nor any other commenter, offers anything to suggest that Congress intended to alter the FCC's jurisdictional analysis through the 1996 Act.²⁰

Consistent with this analysis, there is no basis for altering the Commission's application of the end-to-end jurisdictional analysis.

II. AS HELD BY THE COMMISSION, GTE'S ADSL SERVICE IS AN INTERSTATE ACCESS SERVICE UNDER THE "TEN PERCENT" RULE.

In the *ADSL Order*, the Commission held that GTE's ADSL service is properly tariffed at the federal level because it carries greater than a *de minimis* amount (*i.e.*, ten percent) of inseverable interstate traffic.²¹ As explained by GTE and other parties, the Commission's conclusion that over ten percent of end users' Internet traffic is interstate

¹⁸ See WUTC Comments at 5-6.

¹⁹ See *id.*, citing *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190, 208-209 (1993); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251, 253-254 (1984).

²⁰ Certainly, there is no evidence that Congress has decided that states are better situated to address anti-competitive practices or that consumer expectations require tariffing at the state level, rather than the federal level. See WUTC at 5.

²¹ See *ADSL Order*, ¶ 26.

is supported by evidence in the record concerning the nature of the Internet and by common sense.²²

Neither MCI, nor any other party submitting comments in the tariff investigation, offered factual support challenging the Commission's conclusion regarding the interstate nature of Internet traffic. In fact, MCI asserts in its petition only that "it is entirely possible that less than ten percent of *certain end users' Internet traffic* may be destined for websites in other states or countries."²³ Identifying an exceptional end-user that visits only in-state websites does not change the fact that Internet access, on the whole, invariably involves considerable interstate traffic. Moreover, focusing on the outlying end user is inapplicable here because GTE's service will most commonly be used by aggregators (ISPs, IXCs and CLECs), rather than individual end users.²⁴ Finally, as the Commission noted in its decision, GTE has stated that it intends to ask its customers receiving ADSL service to certify that over ten percent of their Internet traffic is interstate.²⁵

In a post-decision attempt to resurrect this argument, Hyperion submits that "preliminary results" of an "ongoing Internet traffic study" refute the widely-held belief

²² See Direct Case of GTE at 15-20; Opposition of GTE at 8.

²³ See MCI WorldCom Petition at 10 (emphasis added).

²⁴ See Direct Case of GTE at 3-4.

²⁵ See *ADSL Order* at n.95. Also without merit is RCN's assertion that GTE's ADSL service must necessarily be considered a local exchange offering because it does not fall within the new statutory definition of "exchange access." See RCN Comments at 2-4. The FCC concluded that GTE's service is a "special access service, thus warranting federal regulation under the 'ten percent' rule." See *ADSL Order*, ¶ 25. This finding is entirely consistent with the Communications Act and should not be disturbed.

that the Internet is overwhelmingly interstate and international in nature.²⁶ Hyperion's desperate assertion, however, is wholly unsupported: it fails to offer a single detail about the methodology used in this study or the nature of the preliminary findings, and does not even disclose when (or if) the results will be ever be published. Despite its complete lack of substantiation, Hyperion nonetheless urges the Commission to jettison its common sense approach and instead to reconsider its Order based on an unfinished study that the Commission has never seen. Even if Hyperion had disclosed its purported findings, the Commission's rules counsel against consideration of new facts submitted at such a late stage in a reconsideration proceeding.²⁷

III. THE JURISDICTIONAL ROLES OF STATE AND FEDERAL REGULATORS ARE CLEARLY DEFINED IN THE ORDER.

Some commenters support NARUC's request that the Commission use this proceeding as a mechanism for elaborating on the proper exercise of state jurisdiction over DSL services. For example, the Minnesota Public Utilities Commission requests clarification that its order "does not preclude states from requiring intrastate tariffs" for DSL services used for Internet access.²⁸ In the *ADSL Order*, the Commission made

²⁶ Hyperion Comments at 2 (claiming to have obtained "results . . . indicat[ing] that, as a percentage of total connect time, interstate transmissions fall well below ten percent of total telecommunications traffic").

²⁷ See 47 C.F.R. § 1.106(c)(1) and (2) (allowing new facts where circumstances have changed, where facts could not have been discovered earlier, or where consideration of submitted facts is required in the public interest). This is not a case involving changed circumstances; there is no reason why this information could not have been discovered earlier; and, finally, sandbagging with this evidence, and not allowing the Commission or other parties to review these new "facts" is not in the public interest.

²⁸ Minnesota Department of Public Service Comments at 1; see *also* WUTC (Continued...)

clear the jurisdictional roles of federal and state regulators with respect to GTE's ADSL service.²⁹ Consistent with this holding, and with the Commission's conclusion that GTE's service has a substantial, inseparable interstate component, GTE has obtained a federal tariff. GTE will tariff its service at the state level if traffic for a given customer is jurisdictionally intrastate. Accordingly, it would be inappropriate and entirely unnecessary for the Commission to expand its jurisdictional holding.

IV. THE COMMISSION CORRECTLY DECLINED TO DECIDE ISSUES BEYOND THE SCOPE OF GTE'S PROPOSED TARIFF.

As GTE established in its Opposition, the Commission correctly chose to analyze GTE's ADSL tariff based only on the type of service GTE intends to provide -- Internet access -- and declined to analyze other speculative uses of this ADSL service.³⁰ For the same reasons, the Commission should not reopen this tariff proceeding, as urged by MCI and several commenters,³¹ to consider questions relating to the universe of possible ADSL applications. For example, the California Public Utilities Commission's ("CPUC") "request for clarification that ADSL services are not inherently interstate services,"³² and Transwire's insistence that the Commission examine a wide range of non-Internet applications for ADSL should not be addressed in the context of this

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Comments at 6-7; CPUC Comments at 5.

²⁹ The FCC was clear: "[s]hould GTE . . . offer an xDSL service that is intrastate in nature . . . that service should be tariffed at the state level." *ADSL Order* at ¶ 27.

³⁰ See Opposition of GTE at 7-8.

³¹ See MCI WorldCom Petition at 7.

³² See CPUC Comments at 4.

proceeding.³³ The FCC should not, and cannot, expand this narrow tariff investigation into a far-reaching rulemaking proceeding.

The Commission should similarly decline to expand the scope of the tariff proceeding to wade into the separations treatment of ADSL service.³⁴ As GTE explained in its Opposition, the issue of separations was not designated by the Commission and, accordingly, is beyond the scope of this proceeding.³⁵

V. THE COMMISSION'S DESIGNATION OF ISSUES IN THE TARIFF INVESTIGATION WAS A MATTER WITHIN ITS DISCRETION.

KMC raises a number of issues which, it argues, the FCC impermissibly failed to designate -- suggesting that the Commission's failure constitutes an abuse of discretion. To the contrary, the Commission's decision not to address these issues is firmly within its discretion. It is well-established that the Commission may decide when, and whether, to launch a tariff investigation on its own motion or based on a third party complaint. KMC incorrectly suggests that the tariff streamlining provisions of the 1996 Act somehow eliminate this authority.³⁶ This is flatly wrong. The Commission has explicitly recognized, in the very order cited by KMC, that its investigative authority was unchanged by the 1996 Act.³⁷

³³ See Transwire Comments at 3-5 (urging the Commission to examine a wide range of non-Internet applications for ADSL).

³⁴ See NARUC Petition at 3-7; CPUC Comments at 5.

³⁵ See Opposition of GTE at 10.

³⁶ KMC Comments at 8.

³⁷ *Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996*, Report and Order, 12 FCC Rcd 2170, ¶ 21 (rel. Jan. 31, 1997) ("[a]s the 1996 Act did not amend sections 205 or 208, nor refer to them in amending section 204, it did not
(Continued...)

VI. CONCLUSION.


For the foregoing reasons, and those presented in GTE's Opposition, the Petitions for Reconsideration should be rejected and the Commission's *ADSL Order* left fully intact.

January 19, 1999

Respectfully submitted,

GTE SERVICE CORPORATION and its
affiliated domestic telephone operating
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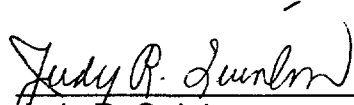
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limit our authority either to conduct tariff investigations under section 205 or to process complaint proceedings commenced under section 208").

CERTIFICATE OF SERVICE

I, Judy R. Quinlan, hereby certify that copies of the foregoing "Reply of GTE" have been mailed by first class United States mail, postage prepaid, on January 19, 1999 to the parties on the enclosed list.



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